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No. 581

In the Supreme Court of the United States

OCTOBER TERM, 1931

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS TRADING AS ADAMS & KITCHEN ET AL., PETITIONERS

v.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AND UNION STOCK YARD & TRANSIT COMPANY, RESPONDENTS

BRIEF FOR INTERSTATE COMMERCE COMMISSION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

E. M. REIDY,
For Interstate Commerce Commission.

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Of Counsel.

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Pursuant to leave of court obtained, the Interstate Commerce Commission, hereinafter called the Commission, submits this brief in support of the petition for writ of certiorari herein.

The decision of the Circuit Court of Appeals for the Seventh Circuit, review of which is sought by this petition, is reported in 51 Fed. (2d) 620, under the title of *Adams & Kitchen et al.* v. *Mellon, Director General.* (R. 389.) It affirmed a judgment

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of the United States District Court for the Northern District of Illinois, Eastern Division (39 Fed. (2d) 80), which rejected an award of reparation made by the Commission (R. 147) (100 I. C. C. 266).

The filing of this brief is prompted by the importance to the railroads, shippers, and the Commission of the question presented, namely, the right of petitioners, commission merchants doing business in the Union Stock Yards in Chicago, in "their own names and right as parties to the transportation transactions who paid the charges to the defendant carriers and also as factors and agents for and on behalf of the livestock shippers who were the consignors" (R. 151), to bring suit upon the award. Other cases are now pending before the Commission, the disposition of which would be governed by the case at bar. We believe the question to be an important one of federal law affecting the Commission's administration of the Interstate Commerce Act and the rights of interstate shippers and carriers generally.

FACTS

This proceeding is an outgrowth of the Commission's order of December 12, 1927, in Docket No. 9777, *Chicago Live Stock Exchange* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 100 I. C. C. 266, in which the Commission held petitioners to be entitled to reparation from the Director General and

the Union Stock Yard & Transit Company, aggregating $140,001.25, plus interest, upon the following findings:

> * * * we find that the collection of separate charges from complainants and interveners for the service of unloading and loading interstate shipments of ordinary livestock at the Chicago stockyards, in addition to the line-haul rates on such livestock, during the reparation period hereinbefore defined, and intrastate shipments during the period of Federal control, was an unlawful and unreasonable practice.
>
> We further find that the following parties of record, either as interveners or complainants other than members of the exchange, have established by competent testimony that they both paid and bore the charges herein found unlawful and unreasonable, and that they have been damaged in the amount of such charges and are entitled to reparation with interest from the date of such payment: * * *
>
> Most of the reparation claimed is by the livestock commission merchants, members of the exchange, covering amounts collected from them for the unloading service at the stockyards. They seek reimbursement in their own names and right as parties to the transportation transactions who paid the charges to the defendant carriers and also as factors and agents for and on behalf of the livestock shippers who were the consignors. While it is admitted that in each

and every instance the charge which was paid by the commission merchant was subsequently charged back and collected from the consignors, this would not affect the right of the complainant consignees to awards of reparation. There is a direct and well-established relation between the complaining members of the exchange and their shippers by which the former are fully authorized to present these claims and seek awards of reparation in their own names as factors and agents for such shippers. The commission merchant at the stockyards not only disposes of the shipper's stock at the market and at such price as he deems best, but is his agent in the payment of freight and related charges, such as feeding, etc., and in the filing of claims for overcharge and for loss and damage to the stock in transit. Defendants have frequently recognized this relationship by settling loss and damage claims with the commission merchants. The right of factors in their representative capacity to recover reparation in their own names for unlawful and unreasonable charges is settled. *Memphis Freight Bureau* v. *St. L. & S. F. R. R. Co.*, 57 I. C. C. 212.

We find that the following individuals, copartnerships, and corporations, parties of record, made the shipments as described in this and our preceding reports and paid the charges thereon, herein and heretofore found to have been unreasonable and unlawful; that they have been damaged in the amount of such charges and are severally entitled to

reparation, as factors and agents for the shippers, with interest from date of payment: (Naming such parties) (R. 150–152).

On respondents' failure to pay the award, this suit was brought by petitioners herein, 103 commission merchants, members of the Chicago Live Stock Exchange. The District Judge instructed the jury to bring in a verdict for respondents, and in his written opinion held that the petitioners had no such legal interest in the proceeding as entitled them to maintain the action; that it was the farmer, shipper and producer of the livestock whose money was illegally retained by the carrier, and that the suit should be brought by the farmer, producer and shipper instead of by the commission men, petitioners herein. (R. 73.) In its opinion the District Court pointed out that the order of the Commission in this case was based upon its prior holding in the case of *Missouri Portland Cement Co.* v. *Director General,* 88 I. C. C. 492, and that the Commission's decision in the *Missouri Portland Cement Company Case* was based in turn upon its interpretation of this court's opinion in the case of *Southern Pacific Co.* v. *Darnell-Taenzer Co.,* 245 U. S. 531. (R. 68.)

Upon appeal, the Circuit Court of Appeals, although affirming the decision of the District Court, said that its "examination of this question does not so entirely satisfy us of the correctness of the District Court's conclusion thereon as to justify our

deciding the appeal upon ground so formal and technical, if a proper result may be reached upon the merits of the cause" (51 Fed. (2d) 620, 623) (R. 394).

The basis of the decision of the Circuit Court of Appeals was this: In about 1894, the Stock Yard Company published a tariff with the Commission fixing a charge of 50 cents for loading and 25 cents for unloading each car of livestock. These charges were absorbed by the line-haul carriers in their duly published tariffs. In 1917, the Stock Yard Company filed a tariff increasing these charges 25 cents per car, or to 75 and 50 cents, respectively. The railroads did not amend their tariffs so as to absorb the additional charge of 25 cents per car, and this additional charge was indorsed on the freight bills, paid by the commission merchants in the stockyards—to whom the shipments were consigned—and ultimately received by respondent Union Stock Yard and Transit Company. (R. 390.) During Federal control, the Director General likewise declined to absorb the 25 cents per car increase, which continued to be paid and collected as before Federal control. (R. 390.) The Circuit Court of Appeals then said:

> The absorption by the line-haul carriers of the originally filed rate of 50 cents and 25 cents for loading and unloading cars was not a gratuity on the part of the carriers. The comprehensive operations of the Stock Yard Co. greatly facilitated the handling of

stock at Chicago for all the line-haul carriers. It undertook the service of rapidly unloading the cars coming into that great market. Its facilities made possible that elasticity of service which tended continuously to speed the unloading of live stock, regardless of variations in daily deliveries by the several carriers, and promptly to release the rolling stock for further movement.

Under the law, the entire transportation service must be rendered at a reasonable rate, and the absorption of this loading and unloading charge was in fact a promulgation by the line-haul carriers of such a rate for the entire service as was then deemed reasonable. The result to the shipper would have been the same had the line-haul carriers correspondingly reduced their rates, and not absorbed the loading and unloading charges.

In our judgment this absorption extended only to the amounts specifically named in the absorption clause; and, when the Stock Yard Co. promulgated its 25 cents increase, not only did the original absorption not include this increase, but the line-haul carriers definitely refused to absorb it; and when the carriers passed into federal control the refusal to absorb was persisted in. But this left it none the less the lawful duty of the Stock Yard Co. to collect the increased charge of 25 cents upon each car, and failure to collect would have subjected that company to the penalties which the law prescribes. (R. 395–396.)

In holding that the Stock Yard Company was not a tort-feasor in the collection of the charges assessed, the Court said:

> Appellants earnestly urge that the collection of this charge was a tort, and that all participants therein were joint tort-feasors. We can not believe that the Stock Yard Co. committed a tortious act in collecting and receiving its tariff charge, the failure to collect and receive which would have been a breach of its statutory duty. Nor do we understand how the Director General of Railroads became a tort-feasor through his continuing the prior practice of receiving from the Stock Yard Co. the entire rate, including the additional loading and unloading charges, and then turning back to the Stock Yard Co. that part of the total charge to which it was entitled. Particularly is this so when there is no pretense that either the charge itself or the entire rate including this charge was excessive. But even if technically to be considered a tort, under all the circumstances, so far as the record discloses, it was at most *damnum absque injuria*. (R. 399.)

It will be noted that the Circuit Court of Appeals held also that the Commission's finding that the collection of the increase of 25 cents per car was "an unlawful and unreasonable practice" was not a finding that it was an unreasonable rate. (R. 397.) While on this point the Commission feels

that reparation may be awarded on any violation of the Act subjecting complainants to damage, whether it relates to rate, fare, charge, classification, regulation or practice, (Section 15) it thinks best to call the court's attention to the fact, as shown in its findings quoted at pages 3 and 4 of this brief, that the Commission found the parties named therein who "paid and bore the charges herein found unlawful and unreasonable" (R. 150) to be entitled to reparation. In another portion of its report it also spoke of these charges, having been "heretofore found to have been unreasonable and unlawful." (R. 151.)

Of concern to the Commission is the question of the standing of these petitioners to sue for reparation. It is our understanding that this question would customarily be the one passed upon by this court before proceeding to a determination of the merits. As stated, the District Court's opinion shows that the Commission's order herein was based upon its *Missouri Portland Cement* decision (88 I. C. C. 492), which in turn follows its interpretation of this court's opinion in the *Darnell-Taenzer Case, supra.* In that case, in passing upon facts in our opinion analogous to the facts herein, this court said:

> The only question before us is that at which we have hinted: whether the fact that the plaintiffs were able to pass on the dam-

age that they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers. The answer is not difficult. The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. *Olds* v. *Mapes-Reeve Construction Co.,* 177 Massachusetts, 41, 44. Perhaps strictly the securing of such an indemnity as the present might be regarded as not differing in principle from the recovery of insurance, as *res inter alios,* with which the defendants were not concerned. If it be said that the whole transaction is one from a business point of view, it is enough to reply that the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer who in turn paid an increased price. He has no privity with the carrier. *State* v. *Central Vermont Ry. Co.,* 81 Vermont, 459. See *Nicola, Stone & Myers Co.* v. *Louisville & Nashville R. R. Co.,* 14 I. C. C. 199, 207–209. *Baker Manufacturing Co.* v. *Chicago & North Western Ry. Co.,* 21 I. C. C. 605. The carrier ought not to be allowed to retain his

> illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. *New York, New Haven & Hartford R. R. Co.* v. *Ballou & Wright*, 242 Fed. Rep. 862. Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result. (13 I. C. C. 680.) Probably in the end the public pays the damages in most cases of compensated torts.

In the *Missouri Portland Cement Case, supra,* the Commission, speaking through Mr. Commissioner Eastman, and after quoting from the Darnell-Taenzer decision, said:

> Two things are clear. One is that the fact that complainant suffered no ultimate damage is not of controlling importance. In the *Darnell-Taenzer case* plaintiffs transferred the damage to the consumer through the selling price of the lumber. Here complainant transferred it to the consignees through separate invoices, and doubtless it finally reached the consumer. As the Supreme Court states in the *Darnell-Taenzer case:* "Probably in the end the public pays the damages in most cases of compensated torts." The court has made proximate rather than ultimate damage the test, and has said that proximately the losses accrue when the charges are paid. The question,

> then, is whether in this case complainant "paid" the charges within the meaning of the court. This leads directly to the second point which is clear, and that is that the consignees from whom complainant collected the charges by separate invoices paid the charges and could have maintained an action for recovery, for in the *Darnell-Taenzer case* the charges were paid by the plaintiffs in a similar manner. That is to say, payment was not direct to the railroad but through a third party. Conceding that here the consignees bore and "paid" the freight charges as such, did the complainant also pay within the meaning of the Court? (Id. 495.)

Answering the question asked in the last quotation, the Commission said:

> In this case not only did the consignees, the undisclosed principals, make no objection to the action brought by complainant, their agent, but the record shows that one of them at least was represented at the hearing and wholly aware of the nature of the proceeding. The conclusion follows that under the circumstances of the case complainant had a right to bring the action. The consignees also had such a right and, if they had exercised it, they would have been substituted for complainant, but they did not exercise it. Doubtless, also, they will have a right to recover from complainant any reparation that he may be awarded with respect to the 71 carloads, the freight charges

> upon which they bore as such. It is not necessary for us to go beyond the "first step," and under the circumstances of this case the first step was taken by complainant when it paid the freight charges. (Id. 496.)

The doctrine enunciated in the *Missouri Portland Cement Company Case* has been followed by the Commission in a great many cases. In fact in its opinion in the case now under review the District Court said:

> If, on the other hand, it [this case] is to be decided in accordance with the holding of the commission in the *Missouri Portland Cement Company case,* and forty or fifty similar holdings since the decision in that case, then the plaintiffs are the proper parties to maintain this suit. (R. 69.)

Although the Circuit Court of Appeals did not pass upon the question the Commission is particularly interested in, namely, the right of the petitioners to recover reparation before the Commission, it is believed that the decision of the District Court, as affirmed by the Circuit Court of Appeals, leaves in doubt an important question of Federal law, the final determination of which is essential to the proper performance of the Commission's administrative functions. The determination of the question as to the right of a number of individual shippers, whose separate claims may be insignificant but which, as here, aggregate a considerable sum, to present their claims for reparation through the medium of an association, is an

added reason why the writ prayed should be granted.

Respectfully submitted.

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